Melewar Apex Sdn Bhd v Malayan Banking Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS D4–22–479 OF 2001 AND D4–22–478 OF 2001
ABDUL WAHAB PATAIL J
4 OCTOBER 2006

Banking — Banker and customer — Forgery — Drawing of cheques with forged endorsements — Whether plaintiff must prove identity of person who forged cheques — Whether plaintiff only required to prove upon a balance of probabilities that signatures on cheques were forged — Whether bank must prove that drawer had knowingly or negligently contributed to forgery or making of unauthorised signature — Bills of Exchange Act 1949 s 73A — Whether plaintiff had knowingly or negligently contributed to forgery or making of unauthorised signature — Whether plaintiff vicariously liable and/or contributed to its losses

The plaintiff opened a current account with the defendant ('the account'). At all material times, the sole and only authorised signatory to the account was one Tunku Soraya Dakhlah bte Tunku Abdullah ('Tunku Soraya'), who provided a specimen signature to the defendant upon the opening of the account. The plaintiff contended that the defendant had paid out on 69 cheques, purporting to be drawn by the plaintiff and made payable to the drawee, and debited the account with the amounts thereof. The plaintiff contended that the signatures on the said cheques were not that of Tunku Soraya. This was supported by the testimony of one Lim Yok Chaw ('PW1') who had concluded that the cheques were probably by different authorship. The signatures on those cheques were forged ('the forged cheques') by one Affandi bin Mamat ('finance manager'), who was at the material time in charge of keeping and maintaining the account. This was disputed by the defendant. The defendant also asserted that the forged cheques were issued by the plaintiff's agent and servant on fraudulent misrepresentation to the defendant and not from the defendant's wrong doing and therefore the plaintiff was vicariously liable and/or contributed to its losses.

Held, allowing plaintiff's claim with costs:

(1) Although Tunku Soraya was in court and was cross-examined, no application was made by the defendant to the court for an order that Tunku Soraya to write words, figures or her signature to enable the court to compare with the signatures on the forged cheques or of the specimen signatures provided to PW1. The objection, therefore, that it was not proved who made the specimen signatures provided to PW1 cannot be upheld since Tunku Soraya was not challenged that the specimen signatures were not her signatures and no application was made in court to order Tunku Soraya to provide specimen signatures before the court that could then be used for comparison (see para 26).

(2) It was not necessary for the plaintiff, and it was not central to the liability that there must be proof that it was the finance manager who signed or forged the cheques. The plaintiff was only required to prove upon a balance of probabilities that the signatures on the forged cheques were not the signature of Tunku Soraya (see para 27).

(3) It does not follow that because an employee is authorised to prepare the cheques for signature of the employer, the employer must keep, over and above the general supervision over employees, a close supervision over that employee. A close perusal of s 73A of the Bills of Exchange Act 1949 showed that the burden is upon the bank to prove the drawer had knowingly or negligently contributed to the forgery or the making of the unauthorised signature. There was no evidence adduced that the plaintiff knew the finance manager was unreliable or had a bad record, or that the recruitment was so negligently conducted that the reliability of the finance manager was not addressed, and that these were the factors that contributed to the forgery or the making of the unauthorised signature by the finance manager (see paras 32, 35 & 37).

(4) The forged cheques were invariably drawn as cash cheques, in some cases within a matter of days of the earlier. Yet it was not even suggested that the defendant had at any time inquired why there were only cash cheques. The defendant had failed to bear in mind that the cheque account of a customer is a facility for the customer to use, and the statement of account was an account of the sum of money owed by the bank to its customer. It is a credit-debit account, and the customer has no rights in rem to any currency notes or coin in the bank. The money in the bank belongs to the bank, and it is the bank that decides whether to release its own money upon the purported exercise of authority by a customer who is granted a cheque issuing facility. Whether it could successfully debit the customer's account subsequently is a separate matter. Thus, when a bank pays out on a cheque drawn on a customer's account, it takes the risk of not being able to recover from the customer unless it can be shown the customer had knowingly or negligently contributed to the forgery or the making of the unauthorised signature. The defendant had failed to do this (see para 38).

[Bahasa Malaysia summary

Plaintif telah membuka akaun semasa dengan defendan ('akaun tersebut'). Pada setiap masa matan, satu-satunya penandatangan yang diberi kuasa terhadap akaun tersebut adalah Tunku Soraya Dakhlah bte Tunku Abdullah ('Tunku Soraya'), yang memberikan spesimen tandatangan kepada defendan setelah membuka akaun tersebut. Plaintif berhujah bahawa defendan telah membayar untuk 69 cek, bagi tujuan dikeluarkan oleh plaintif dan dibuat agar dapat dibayar kepada pesuruh bayar, dan didebitkan ke akaun tersebut dengan amaun-amaun tersebut. Plaintif berhujah bahawa tandatangan pada cek-cek tersebut bukannya Tunku Soraya. Ini disokong oleh testimoni Lim Yok Chaw ('PW1') yang membuat kesimpulan bahawa cek-cek tersebut mungkin dibuat oleh orang yang lain. Tandatangan-tandatangan pada cek-cek tersebut telah dipalsukan ('cek-cek palsu') oleh Affandi bin Mamat ('pengurus kewangan'), yang pada setiap masa matan bertugas menyimpan dan

mengendalikan akaun tersebut. Ini telah dipertikaikan oleh defendan. Defendan juga menegaskan bahawa cek-cek palsu tersebut telah dikeluarkan oleh ejen dan pekerja plaintif atas gambaran salah yang palsu kepada defendan dan bukan salah laku defendan dan oleh itu plaintif bertanggungjawab secara vikarius dan/atau menyumbang kepada kerugiannya.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Meskipun Tunku Soraya berada di mahkamah dan telah diperiksa balas, tiada permohonan telah dibuat oleh defendan kepada mahkamah untuk satu perintah agar Tunku Soraya menulis perkataan, nombor atau tandatangannya untuk membolehkan mahkamah bandingkan dengan tandatangan-tadatangan atas cek-cek palsu tersebut atau spesimen tandatangan-tandatangan yang dikemukakan oleh PW1. Bantahan tersebut, oleh demikian, bahawa ia tidak dibuktikan siapa yang membuat spesimen tandatangan-tandatangan yang dikemukakan kepada PW1 tidak boleh dikekalkan memandangkan Tunku Soraya tidak mencabar yang spesimen tandatangan-tandatangan tersebut bukalah tandatangannya dan tiada permohonan telah dibuat di mahkamah untuk memerintahkan Tunku Soraya mengemukakan spesimen tandatangan-tandatangan ke mahkamah yang pada masa itu boleh digunakan sebagai perbandingan (lihat perenggan 26).

(2) Adalah tidak perlu untuk plaintif, dan bukanlah penting kepada liabiliti bahawa hendaklah ada bukti yang pengurus kewanganlah yang menandatangani atau memalsukan cek-cek palsu tersebut. Plaintif hanya dikehendaki membuktikan atas imbangan kebarangkalian bahawa tandatangan-tandatangan atas cek-cek palsu tersebut bukanlah tandatangan Tunku Soraya (lihat perenggan 27).

(3) Adalah tidak diikuti bahawa oleh kerana seorang pekerja diberi kuasa untuk menyediakan cek untuk tandatangan majikan, majikan itu hendaklah memastikan, lebih daripada pengawasan biasanya ke atas pekerja-pekerja, suatu pengawasan teliti ke atas pekerja tersebut. Penelitian kepada s 73A Akta Bil Pertukaran 1949 menunjukkan bahawa beban terletak ke atas bank untuk membuktikan penyuruh bayar mengetahui atau dengan cuai menyumbang kepada pemalsuan atau pembuatan tandatangan yang tidak sah itu. Tiada keterangan telah dikemukakan bahawa plaintiff mengetahui pengurus kewangan tidak boleh dipercayai atau mempunyai rekod tidak baik, atau bahawa perekrutan telah dikendalikan dengan cuai sehingga kebolehpercayaan pengurus kewangan tidak dikemukakan, dan bahawa berikutlah faktor-faktor yang menyumbang kepada pemalsuan atua pembuatan tandatangan yang tidak sah oleh pengurus kewangan itu (lihat perenggan 32, 35 & 37).

(4) Cek-cek palsu tersebut selalunya dikeluarkan sebagai cek-cek tunai, dalam beberapa keadaan. Defendan telah gagal untuk mengambilkira bahawa cek akuan seorang pelanggan merupakan kemudahan untuk pelanggan menggunakannya, dan penyata akaun adalah suatu akaun sejumlah wang yang terhutang oleh bank kepada pelanggannya. Ia adalah suatu akaun kredir-debit, dan pelanggan tiada hak in rem ke atas apa-apa nota mata wang atau duit syiling bank. Wang dalam bank adalah milik bank, dan banklah yang

memutuskan sama ada untuk melepaskan wangnya berdasarkan penggunaan kuasa oleh seorang pelanggan yang telah diberikan kemudahan pengeluaran cek. Sama ada ia berjaya mendebitkan akaun pelanggan selepas itu adalah satu perkara yang berasingan. Oleh itu, apabila sebuah bank membayar suatu cek yang dikeluarkan ke atas akaun pelanggan, ia mengambil risiko tidak dapat semula daripada pelanggan kecuali jika dapat ditunjukkan pelanggan itu mengetahui atau menyumbang kecuain terhadap pemalsuan atau pembuatan tandatangan tidak sah itu. Defendan telah gagal untuk berbuat demikian (lihat perenggan 38).]

Notes

For cases on forgery, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1847–1852.

Cases referred to

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors [1986] 1 AC 80 (refd)
UAB Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182 (refd)

Legislation referred to

Bills of Exchange Act 1949 s 73A
Evidence Act 1950 ss 67, 73

PL Leong (Mark Lau with him) (Sivananthan) for the plaintiff.
CL Lim (Azam Lim & Pang) for the defendants.

Abdul Wahab Patail J:

[1] By this action the plaintiff claimed for the following:

(a) a declaration that the defendant had wrongfully debited the plaintiff's account with the total amount of RM540,500;

(b) the sum of RM540,500;

(c) interest;

(d) costs; and

(e) such further and other relief as this court deems fit.

[2] On or about 2 August 1994, the plaintiff applied to open a current account with the Defendant at its branch at Kompleks Pernas Sogo, 190 Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur. The application was approved and an account was therefore opened on 6 September 1994, bearing the number 5-14347-50214-7 ('the account').

[3] At all material times, the sole and only authorised signatory to the account was one Tunku Soraya Dakhlah bte Tunku Abdullah, who provided a specimen signature to the defendant upon the opening of the account.

A **[4]** The plaintiff pleaded that from on or around 14 July 1998 until August 2000, the defendant paid out on 69 cheques, purporting to be drawn by the plaintiff and made payable to the drawee, and debited the plaintiff's account with the amounts thereof.

B **[5]** This above is disputed by the defendant in the analysis of pleadings as a question of fact that on or around 14 July 1998 to August 2000, the defendant paid on the cheques listed in para 8 of the statement of claim or para 7 below.

[6] The plaintiff pleaded that however, the signatures on the said cheques were not that of the authorised signatory as provided to the defendant. The signatures on those C cheques were forged ('the forged cheques') by one Affandi bin Mamat, who was at the material time in charge of keeping and maintaining the plaintiff's accounts.

[7] This above is disputed by the defendant as a question of fact that the signatures on the cheques were forged. Alternatively, the defendant asserted they were issued by D the plaintiff's agent and servant on fraudulent misrepresentation to the defendant and not from the defendant's wrong doing. The plaintiff is vicariously liable and/or contributed to its losses.

[8] The plaintiff pleaded that upon discovery by the plaintiff of the forged cheques, the plaintiff immediately informed the defendant of the same by a telephone E conversation on 7 September 2000 and its letter dated 7 September 2000.

[9] This above is disputed by the defendant as a question of fact that the plaintiff had immediately informed the defendant when it discovered the forged cheques.

F **[10]** Particulars of the allegedly forged cheques were provided. This is disputed by the defendant as a question of fact that the cheques were forged.

[11] The plaintiff pleaded that the plaintiff did not draw or authorise the drawing of the forged cheques, and the defendant had therefore wrongfully and without the G plaintiff's authority paid on the forged cheques and debited the plaintiff's account with the amounts thereof.

[12] This above is disputed by the defendant as a question of fact on similar grounds.

H **[13]** There is a second suit D4–22–478–2001 for four other cheques for the sum of RM20,020 where the defendant is Phileo Allied Bank (M) Bhd. The issues are the same.

I **[14]** The defendant banks, Malayan Banking Bhd and Phileo Allied (M) Bhd are collectively referred to as the banks.

THE LAW

[15] The case law netted upon are as follows.

[16] In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors* [1986] 1 AC 80 (PC), the Privy Council rejected the argument that the customer of the bank had any duty to check the bank statements for irregularities and to inform the bank. It was held that the customer's duty is two fold: A

(a) He must exercise due care in drawing his cheques so as not to facilitate fraud or forgery; and B

(b) He must inform his bank at one of any unauthorised transactions or cheques which he becomes aware of.

[17] The forgery went undetected for a long time as the employee in *Tai Hing Cotton Mill Ltd v Liu Chang Hing Bank Ltd & Ors* was, like the employee in this case, a trusted employee. C

[18] The above case was followed by the Supreme Court in *UAB Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, which also held that the plaintiff must prove upon a balance of probabilities that the cheques were forged. The explanation was given at p 190 of the said case, that a forged instrument is a nullity and a banker can derive no authority, actual or implied, from its customer, to act upon it. Any payment made upon such instrument is the liability of the bank only. D E

PAYING OUT ON CHEQUES

[19] The basis of the plaintiff's case is that the banks paid out on forged cheques upon presentation. F

[20] In both cases the sole signatory of the cheque account is Tunku Soraya. Tunku Soraya testified she did not sign the cheques. This is supported by the testimony of Lim Yok Chaw (PW1) who had concluded that the cheques were probably by different authorship. G

[21] Notwithstanding that the Defendant in the pleadings had disputed as a question of fact that the defendants had, on or around 14 July 1998 to August 2000, paid out on the cheques, the matter was not pursued in the trial. The court concludes that the defendants conceded they had paid out on the cheques. H

WHETHER THE CHEQUES WERE FORGED

[22] The remaining issue is whether the cheques were in fact forged. I

[23] The defendants submitted that while it is accepted that the cheques were examined by PW1, and that the signatures thereon differed from the specimen signature provided to him, there was no evidence who signed the specimen signatures.

[24] In each of the two reports prepared by PWI, the specimen signatures were the same set in an envelope marked 'A', being:

(a) signatures above the words 'Executive Director' in Melewar Apex Sdn Bhd letters dated 23 January 1998, 26 June 1998, and 29 September 1998 respectively,

(b) specimen signature beside 'EXECUTIVE DIRECTOR' and below 'MELEWAR APEX SON BHD' on the specimen signature card of Account No 687-0-581904 dated 19 December 1997, and

(c) signatures on three pieces of paper. The reports were to the effect that the signatures on the cheques submitted differed from the signatures in envelope marked 'A' as to handwriting characteristics.

[25] It is provided by s 73 of the Evidence Act 1950 that:

(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written of made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

(2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person....

[26] Although Tunku Soraya was in court and was cross-examined, no application was made by the defendants to the court for an order that Tunku Soraya to write words, figures or her signature to enable the court to compare with the signatures on the cheques or of the specimen signatures provided to PW1. The objection, therefore, that it was not proved who made the specimen signatures provided to PW1 cannot be upheld since Tunku Soraya was not challenged that the specimen signatures were not her signatures and no application was made in court to order Tunku Soraya to provide specimen signatures before the court that could then be used for comparison. In the event, the court not only accepts the testimony of Tunku Soraya that: (a) the signatures on the cheques were not her signature; (b) the specimen signatures provided to PW1 were what they purported to be since there is no evidence to the contrary, ie that they were the signature specimens of Tunku Soraya, but also therefore the evidence of PW1 that the signature on the cheques were not made by the person who signed the specimen signatures.

[27] Reliance upon s 67 of the Evidence Act 1950 that 'If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting shall be proved to be in his handwriting' is erroneous for it is not necessary for the plaintiff, and it is not central to the liability that there must be proof

that it was the finance manager who signed or forged the cheques. The plaintiff is only required to prove upon a balance of probabilities that the signatures on the cheques were not the signature of Tunku Soraya.

BILLS OF EXCHANGE ACT 1949

[28] The banks rely upon the fact that notwithstanding that Tunku Soraya is the sole signatory, the cheque book was left with the finance manager, and if the allegation is true, Tunku Soraya did not check the accounts for 26 months. The banks also relied upon s 73A of the Bills of Exchange Act 1949 which provides, with effect from 1 July 1998 that:

> Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorised signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.

[29] In other words, the Act gives protection against paying out on cheques which contained forged signatures. It was provided that the bank may treat such cheques as properly signed if it is proven that the drawer had knowlingly or negligently contributed to the forgery or the making of the unauthorised signature.

[30] It was submitted that the circumstances of the case warrant the operation of s 73A in order to protect the paying bank for the following reasons:

(a) The plaintiff had knowingly allowed the perpetrator full access to the plaitniff's account.

(b) The plaintiff negligently did not check its monthly bank statements for the entire 26 months. The plaintiff's PW2 confirms having received the statements from both the branches under cross-examination. She says she did not read them. That is negligence.

(c) Even if the cheques were forged which is denied, the perpetrator, allegedly the finane manager, who at the material times the plaintiff's agent and servant, was allowed opportunity to forge the signature so well that the expert PW1 testified in cross-examination that he could not tell the difference between those in the disputed cheques and those on the 'A' documents. The banks had only paid on those cheques out of good faith.

[31] The plaintiff is a company. It acts through its agents and servants. It is expected that the finance manager of the company would keep the cheque books and accounts of the company. Nothing in s 73A of the Bills of Exchange Act 1949 would cause any change in the decision in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors* with regard to reliance upon a trusted employee to keep the cheque book, and to prepare cheques if any are to be drawn from the cheque account.

[32] The defendants referred to p 545 of *Law and Banking Vol 1: Banker and Customer* (3rd Ed, 1995) by Poh Chu Chai where the learned author wrote:

> In cases where an employee was authorised to prepare cheques for the signature of an employer, then the employer was under a duty to keep a close supervision over his employee

[33] With respect, it does not follow that because an employee is authorised to prepare the cheques for signature of the employer, the employer must keep, over and above the general supervision over employees, a close supervision over that employee. The statement by the learned author did not appear to have addressed this point which is apparent in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors*. It might be a different matter if that employee were authorised to sign the cheques for the employer.

[34] In *Banking and Negotiable Instruments Handbook* by Lee Mei Pheng (2004 Ed) at p 21, the learned author correctly wrote:

> With effect from 1 July 1998, s 73A of the Bills of Exchange Act 1949 gives protection against paying on cheques which contain forged or unauthorised drawers' signatures. The bank may treat such cheques as being properly signed or authorised if it is proven that the drawer had 'knowingly or negligently' contributed to the forgery or the making of the unauthorised signature.

[35] A close perusal of s 73A shows that the burden is upon the bank to prove the drawer had knowingly or negligently contributed to the forgery or the making of the unauthorised signature.

[36] It is clear that s 73A was not a complete but was a qualified reversal of the previous law, placing the burden upon the bank to prove that the drawer:

(a) had acted knowingly or negligently; and

(b) thereby contributed

  (i) to the forgery; or

  (ii) the making of the unauthorised signature.

[37] There is no evidence adduced that the plaintiff knew the finance manager was unreliable or had a bad record, or that the recruitment was so negligently conducted that the reliability of the finance manager was not addressed, and that these were the factors that contributed to the forgery or the making of the unauthorised signature by the finance manager.

[38] The cheques were invariably drawn as cash cheques, in some cases within a matter of days of the earlier. Yet it is not even suggested that the bank had at any time inquired why there were only cash cheques. The bank clearly failed to bear in mind that the cheque account of a customer is a facility for the customer to use, and the statement of account is an account of the sum of money owed by the bank to its customer. It is a credit-debit account, and the customer has no rights in rem to any

currency notes or coin in the bank. In plainer terms, the money in the bank belongs to the bank, and it is the bank that decides whether to release its own money upon the purported exercise of authority by a customer who is granted a cheque issuing facility. Whether it could successfully debit the customer's account subsequently is a separate matter. Thus when a bank pays out on a cheque drawn on a customer's account, it takes the risk of not being able to recover from the customer unless it can show the customer had knowingly or negligently contributed to the forgery or the making of the unauthorised signature. This the banks have failed to do.

[39] In the circumstances, the claim by the plaintiff in each case was allowed with costs.

Plaintiff's claim allowed with costs.

Reported by Peter Ling